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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LAVERNE L. LOGAN,

Appellant,

v.

ZIMMERMAN BRUSH COMPANY,

Appellee.

ON APPEAL FROM THE ILLINOIS SUPREME COURT

BRIEF FOR APPELLEES ILLINOIS HUMAN RIGHTS COMMISSION, DELORES NEIGHBORS AND CONNIE VILLALBA.

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QUESTION PRESENTED

Whether the Fair Employment Practices Act conferred upon Mr. Logan a legitimate claim of entitlement to a determination on the merits of his timely filed charge of discrimination, whereby due process precludes the termination of Mr. Logan's interests based solely on the failure of the Fair Employment Practices Commission to convene a timely fact finding conference?

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SUMMARY OF ARGUMENT

The Fair Employment Practices Act creates a substantive entitlement for Mr. Logan to be free of employment discrimination on account of his physical handicap. The FEPA also contains a "for cause" standard for dismissing a timely filed charge of discrimination, as a complainant has the right to seek judicial review of an order of the Fair Employment Practices Commission dismissing a charge as non-meritorious. Ill. Rev. Stat. 1979, ch. 48, § 860. The failure of the Commission to convene a timely fact finding conference cannot deprive Mr. Logan of his legitimate claim of entitlement to a determination on the merits of his timely filed charge.

This Court has utilized the presence of a "for cause" standard for deprivation of a statutory entitlement as indicative of whether a legitimate claim of entitlement has been created.

Memphis Light, Gas & Water Div. v. *Craft,* 436 U. S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554(1978). When state law provides that a benefit can only be terminated for cause, a person has a legitimate claim of entitlement to it within the protection of the Due Process Clause. *Id.* at 11-12. As Mr. Logan's timely charge can only be dismissed "for cause", he is entitled to attempt to establish before the Commission that an unfair employment practice was committed, and that he is eligible for the substantial relief available to an aggrieved person under the FEPA. *Goldberg* v. *Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011(1970).

This Court has said that a cause of action created by the State is arguably a "species of 'property' protected by the Due Process Clause." *Martinez* v. *California,* 444 U. S. 277, 281-82, 62 L. Ed. 2d 481, 100 S. Ct. 553(1980). Although the State can create defenses to a cause of action, this Court said that the action of the State cannot be "wholly arbitrary or irrational." *Id.* at 282. The termination of Mr. Logan's cause of action through no fault of his own and without any consideration of the merits because of the administrative error is wholly arbitrary and irrational.

As the FEPA conferred upon Mr. Logan a property interest in his cause of action, Mr. Logan's property interest cannot be extinguished by a statutory procedure that does not afford due process. *Arnett* v. *Kennedy,* 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633(1974).

Due process required that Mr. Logan have the opportunity to attempt to establish before the Commission that his charge is meritorious and that he is eligible for the substantial relief available in the FEPA.

ARGUMENT

THE FAIR EMPLOYMENT PRACTICES ACT CONFERRED UPON MR. LOGAN A LEGITIMATE CLAIM OF ENTITLEMENT TO A DETERMINATION ON THE MERITS OF HIS TIMELY FILED CHARGE OF EMPLOYMENT DISCRIMINATION, AND DUE PROCESS OF LAW REQUIRES THAT MR. LOGAN'S CHARGE CANNOT BE EXTINGUISHED WITHOUT CONSIDERING THE MERITS OF HIS CHARGE.

The Fair Employment Practices Act (hereinafter "FEPA") creates an important substantive interest that Mr. Logan and other physically handicapped persons shall be free from employment discrimination. To effectuate this interest the Illinois General Assembly provided that the Fair Employment Practices Commission (hereinafter "Commission") can order that an aggrieved person be hired or reinstated and be paid for back pay and attorney's fees, as well as requiring an employer to cease the discriminatory practices. Ill. Rev. Stat. 1979, ch. 48, § 858.01(c). The importance of the interest created to be free from employment discrimination is evident from the FEPA, which says that such discrimination:

> .... [D]eprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies resulting in grave injury to the safety, health and welfare: ... Ill. Rev. Stat. 1979, ch. 48, § 851.

Also determinative of whether Mr. Logan has a legitimate claim of entitlement to a determination of the merits of his charge under the FEPA is the fact that the Illinois General Assembly provided complainants with the right of obtaining judicial review when the Commission dismisses a charge as non-meritorious either after initial investigation or subsequently after an evidentiary hearing. Ill. Rev. Stat. 1979, ch. 48, § 860.

By providing an adjudicatory system in which an aggrieved person's timely filed charge of discrimination can only be dismissed "for cause," the Illinois General Assembly created a legitimate claim of entitlement in Mr. Logan to receive a determination of the merits of his charge. As the FEPA conferred upon Mr. Logan a property interest in his cause of action, Mr. Logan cannot be deprived of that interest, through no fault of his own, because of the failure of the Commission to comply with the requirement in the FEPA that it convene a fact finding conference within 120 days. Ill. Rev. Stat. 1979, ch. 48, § 858(b).

It is settled that whether a property interest has been created is decided by reference to "an independent source such as state law." *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U. S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978); *Board of Regents* v. *Roth,* 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). In *Board of Regents* v. *Roth* this Court said that:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . . *Id.* at 577.

For a person to have a property interest in a benefit, state law must provide him with a legitimate claim of entitlement to the benefit as opposed to a mere unilateral expectation of it. *Id.* at 577. This Court has utilized the presence of a "for cause" standard for deprivation of a statutory entitlement as indicative of whether a legitimate claim of entitlement has been created. *Memphis Light, supra* at 11-12; *Bishop* v. *Wood,* 426 U. S. 341, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976). In *Memphis Light,* this Court said that, as the utility service could only be terminated for cause, the respondents could "assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause." *Id.* at 11-12.

As the FEPA provides a complainant with the right to obtain judicial review of an order of the Commission dismissing his charge after initial investigation for a lack of substantial evidence or of a determination by the Commission following a hearing that the complainant has not established his charge by a preponderance of the evidence, it is clear that a complainant's properly filed charge can only be dismissed "for cause." Providing a complainant with the right of judicial review of a determination by the Commission that his charge is non-meritorious is in marked contrast to the situation in *Bishop* v. *Wood, supra,* in which state law provided that a public employee could be terminated at will and did not create any right for an employee to obtain judicial review. In *Goldberg* v. *Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) this Court held that the welfare recipients had a claim of entitlement to welfare payments stemming from the statute defining eligibility for benefits, and that they had a right to a hearing in which they could attempt to show that they were within the statutory terms of eligibility. Similarly, the FEPA provides that Mr. Logan can get his job back along with payment of back pay and attorney's fees if he can establish that he was discriminated against on account of his handicap. As the General Assembly also provided Mr. Logan with the right to obtain judicial review if the Commission found his charge to be non-meritorious, he certainly has a legitimate claim of entitlement to have the Commission adjudicate the merits of his charge.

As construed by the Illinois Supreme Court the FEPA provides the Commission with the unreviewable power to act arbitrarily in that it can extinguish a complainant's rights by simply not holding a fact finding conference within 120 days, while if it dismisses a charge of discrimination as non-meritorious the complainant can obtain review in the courts. The Commission has never contended that it possessed such an unreviewable power to extinguish the rights of a complainant such as Mr. Logan who timely filed a charge of discrimination.

Zimmerman Brush Co. v. *Fair Employment Practices Commission,* 82 Ill. 2d 99, 411 N. E. 2d 277 (1980). The erroneous scheduling by the investigator of the instant fact finding conference five days beyond the 120 day period cannot deprive Mr. Logan of the important substantive interest conferred upon him by the FEPA to be free of discrimination in employment on account of his physical handicap with vindication of that interest through an adjudicatory system in which his properly filed charge can only be dismissed for cause.[1] Mr. Logan's cause of action pursuant to the FEPA constitutes a property interest, which cannot be extinguished under the Due Process Clause without an opportunity establish that he has been a victim of discrimination and is entitled to the statutory relief available in the FEPA.

In *Martinez* v. *California,* 444 U. S. 277, 281-82, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980), this Court said that a cause of action created by the State is arguably a "species of 'property' protected by the Due Process Clause." Although the State can create defenses to a cause of action it created, this Court said that the action of the state cannot be "wholly arbitrary or irrational." *Id.* at 282. The termination of Mr. Logan's timely charge through no fault of his own without any bearing on the merits of his charge, because the Commission convened the fact finding conference five days late, is wholly arbitrary and irrational. The dismissal of Mr. Logan's charge without any determination of the merits and without any fault on his part neither protects employers from unfounded charges of discrimination nor leads to the just resolution of disputes. Convening the fact finding conference beyond 120 days does not even affect the potential financial burden upon Zimmerman Brush Company in the event of an adverse finding that it discriminated against Mr. Logan. On the other hand Mr.

[1] The Illinois General Assembly has already made the holding of a fact finding conference discretionary by providing in the Human Rights Act, which encompasses the former FEPA, that the Department "may conduct a fact-finding conference." Ill. Rev. Stat. 1980 Supp., ch. 68, § 7-102(c)(3).

Logan is deprived of his cause of action under the FEPA and the opportunity to use the adjudicatory system to establish that he was discriminated against and is entitled to the substantial relief available to a victim of discrimination under the FEPA.

As the FEPA conferred upon Mr. Logan a property interest in his cause of action, Mr. Logan's property interest cannot be extinguished by a statutory procedure which does not afford due process. *Arnett* v. *Kennedy,* 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974). In *Arnett* a six member majority of the Court rejected the view that a statute which confers a property interest can also limit the statutory procedures for deprivation of the interest created without analyzing the adequacy of such procedures in constitutional terms. As the mandatory requirement in the FEPA that a fact finding conference be convened within 120 days permits the termination of Mr. Logan's property interest in his cause of action without any fault on his part and without any connection to the merits of his charge, it is violative of due process.

Due process requires that Mr. Logan have the opportunity to attempt to establish before the Commission that his charge is meritorious, and that he is entitled to the relief available to prevailing complainants under the FEPA. The FEPA creates a legitimate claim of entitlement for a complainant to have the Commission adjudicate his charge on the merits and to seek judicial review of that determination. The failure of the Commission to convene a fact finding conference within 120 days cannot, consistent with due process, deprive Mr. Logan, through no fault of his own, of the right to present evidence before the Commission and receive an adjudication of the merits of his charge, with the subsequent right to judicial review of an adverse determination.

Mr. Logan argues that had the Commission included in the Notice of Fact Finding Conference notice that the 120 day period was mandatory and that failure to comply would require dismissal of his charge, then the dismissal of his charge because of the error by the Commission would not violate due process. The inclusion of such additional notice, however, does not alter the fact that a complainant who files a timely charge can nevertheless be deprived of his legitimate claim of entitlement to a determination on the merits of his charge solely because of the failure of the Commission to comply with the FEPA. Having conferred a property interest upon a complainant in his cause of action under the FEPA, a failure by the Commission to perform its duty cannot deprive a complainant of his right to a consideration of the merits of his charge.

CONCLUSION

For the foregoing reasons, the appellees, Illinois Human Rights Commission, Delores Neighbors and Connie Villalba, submit that the decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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